Liu Thian Leong & Ors v Jee Nyen Chong (sued in his personal capacity and as an office-bearer of the Jawatan Kuasa Dewan Siburan (Siburan Hall Committee) under the provision of s 9(c) of the Societies Act 1966) & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(W)-859–04 OF 2018
HANIPAH FARIKULLAH, RAVINTHRAN AND CHE MOHD RUZIMA JJCA
16 JULY 2021

Tort — Defamation — Libel — Publication of articles in newspapers — Whether impugned words referred to respondents — Whether publications referred to respondents in their official capacities — Whether the imputations were defamatory — Whether respondents had right to bring representative action in libel for damages — Whether defence of qualified privilege, fair comment and justification could succeed — Whether award for aggravated damages justified

This was the appellant's appeal and respondent's cross appeal against the decision in a counterclaim by the High Court. In 1973, some of the villagers in Siburan had registered a society called Siburan Village Hall Committee ('SHC'). The executive committee consisted of a chairman, a vice-chairman, an honorary secretary, an honorary assistant secretary, a treasurer, an assistant treasurer and five ordinary members. The main purpose was to raise funds, construct and run a hall for the benefit of the villagers. In due course, a three-storey building was constructed and housed a multipurpose hall and a basketball court ('the Siburan hall'). Membership of the SHC was on paper open to all villagers, subject to the approval of the executive committee of SHC. It was alleged, inter alia, that the SHC had practised discrimination in respect of the use of the facilities of the Siburan hall. The event that set off a chain of events that led to litigation was a tragedy that took the life of a young female basketball player from Siburan. It was alleged that she was not allowed to use the Siburan hall for training and had to travel to a nearby village by the name of Beratok. On her way back to Siburan, she died in a road accident. Sometime after this accident, the SHC received a letter of demand from 190 villagers to be admitted as members and for facilities of the Siburan hall to be opened up to the residents. The SHC did not accede to this request. The disgruntled residents agreed for a 'sub-committee' to be established to look into the recruitment of new members. The sub-committee was established with the first appellant as chairman, the third appellant as secretary and one Liew Kuet Min as treasurer. A total of 50 applications by Siburan villagers were submitted to the executive committee. Among the applicants were the appellants. All the

A applications were rejected by the SHC as the form used was not proper. The applications were re-submitted. Again, all applications were rejected by the executive committee of the SHC. This time, no reason was given for the rejection. Disappointed, the appellants held a press conference to which members of the Chinese media were invited. They gave vent to their frustration
B about the decision of the executive committee not to accept new members. The executive committee responded by issuing a press statement called the 'notification' that was signed by its secretary, the second respondent. In the said 'notification', the executive committee said that the appellants had caused misunderstanding, created dissatisfaction, hatred amongst the people in the
C village and damaged the reputation of the executive committee of SHC. The appellants took exception to the said press statement. Each of them filed a separate defamation action against the main office-bearers of the SHC, ie, the respondents, who were chairman, secretary and treasurer of the executive committee. They were sued in their 'personal capacity' as well as 'office-bearers'
D of the SHC. All the suits were subsequently consolidated by the court. The main claim trial judge found for the appellants and awarded them damages in the sum of RM60,000, RM40,000 and RM40,000 respectively. The main claim trial judge also ruled that the respondents were not personally liable as the publication was made by the executive committee of the SHC. The SHC
E was ordered to pay the damages. The counterclaim against the appellants was based on nine articles in the four Chinese newspapers that resulted from the said press conference. The respondents pleaded that the appellants maliciously invited the four Chinese papers to publish the defamatory words and thereby greatly injured their reputation in their personal capacity as well as persons in
F charge of the SHC. The appellants denied that the words complained of in the nine articles referred to the respondents and also denied that the words in the natural and ordinary meanings and/or by way of innuendo or inferential meaning were defamatory. The appellants prayed for the claim that relied on the innuendo meaning to be struck out because essential extrinsic facts and the
G identity of persons to whom it was published were not disclosed. The appellants also pleaded that SHC could not sue for libel without proof of special damages because it was a society. The defences of justification, fair comment and qualified privilege were also pleaded by the appellants. The trial judge found that the: (a) words complained of in the nine articles were capable
H of and were defamatory of the respondents; (b) defences of justification, fair comment and qualified privilege were proven; and (c) malice was not relevant as the defences failed but found that it was not proven by the respondent. The appellants appealed against the whole of the decision of the trial judge, whereas the plaintiffs filed a cross appeal. The issues that arose on appeal were:
I (i) whether the words complained of referred to the plaintiffs; (ii) whether the words complained of were defamatory; (iii) whether the publications referred to the plaintiffs in their official capacities; (iv) whether the plaintiffs had a right to bring a representative action in libel for damages; (v) whether the pleading was based on two causes of action; and (vi) whether defences of qualified

privilege, fair comment and justification was proven. A

Held, allowing the appeal in part and dismissing the cross-appeal:

(1) The court found that the learned trial judge correctly directed herself on the law with regard to respondents who were not named in a defamatory publication. Even the first appellant had agreed that the SHC was a small group that comprised the respondents and that this fact was known to the public in Siburan. In the premises, the trial judge properly made a finding of fact that the respondents were the persons referred to in the nine articles which criticized the conduct of the SHC. In any event, insofar as the first respondent was concerned, he was named in three of the articles and therefore his identification as one of the persons who was referred in the said articles was unassailable. Therefore, there was no merit in the ground of appeal that the plaintiffs were not referred to in the articles in question (see paras 27 & 29). B C D

(2) The appellants sued the respondents 'in their personal capacity' and as 'officer-bearers' of SHC. When the respondents herein filed the counterclaim, they sued in their personal capacity and as office-bearers of the SHC. In addition, they also stated in the counterclaim that they were also suing to protect the reputation of SHC. All these appear from the intitulement and the pleadings. Although only three of the articles mentioned the name of the first appellant, all the articles consistently referred to the management or committee of the Siburan hall which was a small group of people. This was the reason the trial judge found that the respondents were identifiable in the nine publications. Therefore, it followed that the articles also referred to the respondents in their official capacities. This did not mean that the respondents as individuals were not entitled to the protection of their private reputation as held by the trial judge. The court found no merit in this ground of appeal. The articles referred to the respondents personally as well as in their official capacities in the executive committee of the SHC (see para 31). E F G

(3) The overall defamatory sting in the entire publication, when looked as a whole imputed dishonourable or discreditable conduct and lack of integrity on the part of the SHC of which the plaintiffs were office-bearers. Further, it was suggested in the articles that the actions of the SHC indirectly caused the death of a young basketball player. There was no error in the trial judge's finding that the imputations contained in the nine articles were defamatory of the plaintiffs and the SHC (see para 36). H I

(4) The court agreed with the submission of counsel for the appellants that a representative action could not be taken in defamation proceedings. However, although the trial judge used the term 'representative capacity', it was clear in her judgment she did not use it in the sense that the

respondents who were office-bearers of the SHC were representing a class of unnamed respondents who were the members of the SHC. The trial judge did not approach the case on the basis that it was class action instituted by three persons on behalf of a small group of people who were not named. All three respondents herein sued in their own names as well as in their capacity as office-bearers. It was clear that the issue of representative capacity only arose in respect of the right of the SHC as an entity to claim for damages. The SHC did not have 'a public officer' registered under s 9(c) of the Societies Act 1973. Thus, all that the trial judge decided in the instant case was that SHC could be represented by its office-bearers who were the respondents. In the premises, this was not a representative action. The trial judge did not consider unnamed plaintiffs who were members of a class in awarding damages. Therefore, this ground of appeal was without any merit (see paras 38–40).

(5) All that the respondents did was to plead alongside the words 'natural and ordinary meaning' and 'inferential meaning', the word 'innuendo'. No extrinsic or special facts to support a legal innuendo were pleaded. Thus, the respondents had loosely used the popular meaning of innuendo and had unwittingly given an impression of having pleaded innuendo as well. Nonetheless, this was a non-issue and nothing turned on it for the simple reason that the trial judge did not find the appellants liable for another cause of action based on legal innuendo as well. She only found the appellants liable for defamation based on the natural and ordinary meaning of the published words. There was no merit in this ground and it was clear that only one cause of action was pleaded (see para 43).

(6) The trial judge did not commit any error when she found that the defence of justification failed. Section 8 of the Defamation Act 1957 did not provide unreservedly that partial justification was sufficient. The qualification was that the unproved charges 'do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges'. There was no merit in the argument of the appellants that the defence of justification succeeded (see paras 49–50).

(7) Even if the allegation that the tragic accident indirectly resulted from the respondents refusal to allow the basketball player to use the Siburan hall could be read as a comment, the basic fact they must prove was that the SHC had barred her from using their facilities. As the trial judge found, this fact was not proved as the mother of the basketball player told the court that her daughter's plan to travel to Beratok village was the original plan and not an alternative plan. This was the most defamatory sting in the nine articles as found by the trial judge. However, there were no proved facts to warrant any comment blaming the death of the basketball

player directly or indirectly on the respondents or the SHC. Therefore, the trial judge had not erred in rejecting the defence of fair comment (see para 55).

(8) The court agreed that even if the publication was patently false and defamatory, the honest belief of the appellants would afford a defence. However, having regard to the formulation of the qualified privilege test, the crucial element that must first be proved is the element of reciprocity between the maker of the communication and the receiver. It must have been made on an occasion of privilege. Any reasonable criticism on an occasion against the oligarchic executive committee of the SHC, such as lack of transparency in processing the applications and the wrong assumptions about the death of the young basketball player, would not defeat the defence of qualified privilege so long as there was no actual malice and the said beliefs were honestly held. However, the appellants had exceeded the right of qualified privilege as they called a press conference to which at least four Chinese newspapers were invited to air their grievances and criticise the executive committee of the SHC. Therefore, the communication in question was made not only to the villagers in Siburan but to the world at large. In the premises, the element of reciprocity between the maker and receiver of the defamatory communication in terms of duty or interest was absent as the said communication would presumably have reached a broad spectrum of people who were strangers insofar as the dispute over membership of the SHC was concerned. Therefore, the defendants failed in the defence of qualified privilege and the decision of the trial judge to reject the defence was correct (see paras 64–66).

(9) The complaint of the respondents that for each of the nine articles, a separate award of damages should have been awarded by the trial judge was absurd. The appellants presided at only one press conference though their statements were reported by four Chinese newspapers in nine articles. On the issue of the second complaint in the cross appeal that each of the defendants should have been ordered to pay damages separately to each of the respondents, the trial judge found that the tort had been committed jointly by the appellants at the press conference. Thus, there was no merit in the argument that each of the appellants should be ordered to pay damages separately. It suffices that the trial judge compensated each of the respondents with a separate award of damages. The trial judge had also correctly exercised her discretion not to award aggravated damages because of the absence of malice on the part of the appellants (see paras 73–76).

[Bahasa Malaysia summary

Ini adalah rayuan perayu dan rayuan balas responden terhadap keputusan dalam tuntutan balas oleh Mahkamah Tinggi. Pada tahun 1973, beberapa

penduduk di Siburan telah mendaftarkan sebuah pertubuhan yang dikenali sebagai Jawatankuasa Dewan Kampung Siburan ('JDKS'). Jawatankuasa eksekutif terdiri daripada seorang pengerusi, seorang naib pengerusi, seorang setiausaha kehormat, seorang penolong setiausaha kehormat, seorang bendahari, seorang penolong bendahari dan lima orang ahli biasa. Tujuan utamanya adalah untuk mengumpul dana, membina dan menjalankan dewan untuk manfaat penduduk kampung. Tidak lama kemudian, sebuah bangunan tiga tingkat telah dibina dan menempatkan dewan serbaguna dan gelanggang bola keranjang ('dewan Siburan'). Keahlian JDKS adalah di atas kertas terbuka kepada semua penduduk kampung, tertakluk kepada kelulusan jawatankuasa eksekutif JDKS. Ia telah didakwa, antara lain, bahawa JDKS telah mengamalkan diskriminasi berhubung penggunaan kemudahan dewan Siburan. Peristiwa yang mencetuskan rangkaian peristiwa yang membawa kepada litigasi adalah tragedi yang meragut nyawa seorang pemain bola keranjang wanita muda dari Siburan. Ia telah didakwa bahawa beliau tidak dibenarkan menggunakan dewan Siburan untuk latihan dan terpaksa pergi ke kampung berhampiran dengan nama Beratok. Dalam perjalanan pulang ke Siburan, beliau meninggal dunia dalam kemalangan jalan raya. Beberapa ketika selepas kemalangan ini, JDKS menerima surat tuntutan daripada 190 penduduk kampung untuk diterima masuk sebagai ahli dan kemudahan dewan Siburan dibuka kepada penduduk. JDKS tidak meluluskan permintaan ini. Penduduk yang tidak berpuas hati bersetuju supaya 'jawatankuasa kecil' ditubuhkan untuk meneliti pengambilan ahli baharu. Jawatankuasa kecil tersebut ditubuhkan dengan perayu pertama sebagai pengerusi, perayu ketiga sebagai setiausaha dan seorang Liew Kuet Min sebagai bendahari. Sebanyak 50 permohonan penduduk kampung Siburan telah dikemukakan kepada jawatankuasa eksekutif. Antara pemohon tersebut adalah perayu. Kesemua permohonan telah ditolak oleh JDKS kerana borang yang digunakan tidak sesuai. Permohonan telah dikemukakan semula. Sekali lagi, kesemua permohonan telah ditolak oleh jawatankuasa eksekutif JDKS. Kali ini, tiada alasan diberikan untuk penolakan tersebut. Kerana kecewa, perayu-perayu mengadakan sidang media yang mana ahli-ahli media Cina dijemput. Mereka melepaskan kekecewaan mereka tentang keputusan jawatankuasa eksekutif untuk tidak menerima ahli baru. Jawatankuasa eksekutif bertindak balas dengan mengeluarkan siding media yang dipanggil 'pemberitahuan' yang ditandatangani oleh setiausahanya, responden kedua. Dalam 'pemberitahuan' tersebut, jawatankuasa eksekutif berkata bahawa perayu telah menyebabkan salah faham, menimbulkan rasa tidak puas hati, kebencian di kalangan penduduk kampung dan merosakkan reputasi jawatankuasa eksekutif JDKS. Perayu-perayu mengambil pendekatan berkecuali terhadap sidang media tersebut. Setiap daripada mereka memfailkan tindakan fitnah berasingan terhadap pemegang jawatan utama JDKS, iaitu, responden, yang merupakan pengerusi, setiausaha dan bendahari jawatankuasa eksekutif. Mereka telah disaman atas 'kapasiti peribadi' mereka serta 'pegangan jawatan' JDKS. Semua tuntutan tersebut kemudiannya disatukan oleh mahkamah. Hakim

perbicaraan tuntutan utama membuat dapatan untuk perayu dan memberikan mereka ganti rugi masing-masing berjumlah RM60,000, RM40,000 dan RM40,000. Hakim perbicaraan tuntutan utama juga memutuskan bahawa responden tidak bertanggungjawab secara peribadi kerana penerbitan tersebut dibuat oleh jawatankuasa eksekutif JDKS. JDKS diarahkan membayar ganti rugi. Tuntutan balas terhadap perayu adalah berdasarkan sembilan artikel dalam empat akhbar Cina yang terhasil daripada siding media tersebut. Responden memplidkan bahawa perayu secara berniat jahat menjemput empat akhbar berbahasa Cina untuk menerbitkan perkataan fitnah dan dengan itu menjejaskan reputasi mereka dalam kapasiti peribadi mereka serta orang yang bertanggungjawab ke atas JDKS. Perayu-perayu menafikan bahawa perkataan yang diadukan dalam sembilan artikel merujuk kepada responden dan juga menafikan bahawa perkataan dalam makna semula jadi dan biasa dan/atau dengan cara sindiran atau makna inferensial adalah fitnah. Perayu-perayu memohon agar tuntutan yang bersandarkan kepada maksud sindiran tersebut dibatalkan kerana fakta ekstrinsik yang penting dan identiti orang yang diterbitkan kepadanya tidak didedahkan. Perayu juga memplidkan bahawa JDKS tidak boleh menyaman bagi libel tanpa bukti ganti rugi khas kerana ia adalah sebuah pertubuhan. Pembelaan kewajaran, ulasan berpatutan dan keistimewaan mutlak juga telah diplidkan oleh perayu. Hakim perbicaraan mendapati bahawa: (a) perkataan yang diadukan dalam sembilan artikel itu mampu dan memfitnah responden; (b) pembelaan kewajaran, ulasan berpatutan dan keistimewaan mutlak telah dibuktikan; dan (c) niat jahat tidak relevan kerana pembelaan gagal tetapi mendapati ia tidak dibuktikan oleh responden. Perayu merayu terhadap keseluruhan keputusan hakim bicara, manakala plaintif memfailkan rayuan balas. Isu-isu yang timbul dalam rayuan ialah: (i) sama ada perkataan yang diadu dirujuk kepada plaintif; (ii) sama ada perkataan yang diadukan berunsur fitnah; (iii) sama ada penerbitan merujuk kepada plaintif dalam kapasiti rasmi mereka; (iv) sama ada plaintif mempunyai hak untuk membawa tindakan representatif dalam libel untuk ganti rugi; (v) sama ada pliding tersebut berdasarkan dua kausa tindakan; dan (vi) sama ada pembelaan terhadap keistimewaan mutlak, ulasan berpatutan dan kewajaran telah dibuktikan.

Diputuskan, membenarkan sebahagiannya rayuan dan menolak rayuan balas:

(1) Mahkamah mendapati bahawa hakim perbicaraan yang bijaksana dengan betul dari segi undang-undang berkenaan dengan responden yang tidak dinamakan dalam penerbitan yang berunsur fitnah. Meskipun perayu pertama telah bersetuju bahawa JDKS adalah kumpulan kecil yang terdiri daripada responden dan fakta ini diketahui umum di Siburan. Berdasarkan premis tersebut, hakim perbicaraan telah dengan betul membuat dapatan fakta bahawa responden adalah orang yang dirujuk dalam sembilan artikel yang mengkritik tindakan JDKS. Dalam apa jua keadaan, setakatmana ia merujuk responden pertama,

beliau dinamakan dalam tiga artikel dan oleh itu identitinya sebagai salah seorang yang dirujuk dalam artikel tersebut tidak boleh dipertikaikan. Oleh itu, tiada merit dalam alasan rayuan bahawa plaintif tidak dirujuk dalam artikel berkenaan (lihat perenggan 27 & 29).

(2) Perayu menyaman responden 'atas kapasiti peribadi mereka' dan sebagai 'pemegang jawatan' JDKS. Apabila responden di sini memfailkan tuntutan balas, mereka menyaman atas kapasiti peribadi mereka dan sebagai pemegang jawatan JDKS. Di samping itu, mereka juga menyatakan dalam tuntutan balas bahawa mereka juga menyaman untuk melindungi reputasi JDKS. Semua ini dinyatakan pada tajuk dan pliding. Walaupun hanya tiga daripada artikel yang menyebut nama perayu pertama, kesemua artikel itu secara konsisten merujuk kepada pengurusan atau jawatankuasa dewan Siburan yang merupakan sekumpulan kecil orang. Ini adalah sebab hakim perbicaraan mendapati bahawa responden boleh dikenal pasti dalam sembilan penerbitan. Oleh itu, berikutan artikel tersebut juga merujuk kepada responden dalam kapasiti rasmi mereka. Ini tidak bermakna responden sebagai individu tidak berhak mendapat perlindungan reputasi peribadi mereka seperti yang diputuskan oleh hakim perbicaraan. Mahkamah mendapati tiada merit dalam alasan rayuan ini. Artikel tersebut merujuk kepada responden secara peribadi dan juga dalam kapasiti rasmi mereka dalam jawatankuasa eksekutif JDKS (lihat perenggan 31).

(3) Kesemua penyataan fitnah dalam keseluruhan penerbitan, apabila dilihat secara keseluruhannya dianggap sebagai kelakuan yang tidak bermaruah atau tidak berwibawa dan kurangnya integriti di pihak JDKS yang mana plaintif adalah pemegang jawatan. Selanjutnya, ia telah dicadangkan dalam artikel bahawa tindakan JDKS secara tidak langsung menyebabkan kematian seorang pemain bola keranjang muda. Tiada kekhilafan dalam dapatan hakim bicara bahawa dakwaan yang terkandung dalam sembilan artikel adalah memfitnah plaintif dan JDKS (lihat perenggan 36).

(4) Mahkamah bersetuju dengan penghujahan peguamcara untuk perayu bahawa tindakan representatif tidak boleh dikemukakan dalam prosiding fitnah. Walau bagaimanapun, meskipun hakim perbicaraan menggunakan istilah 'kapasiti representatif', ia adalah jelas dalam penghakimannya beliau tidak menggunakannya dalam erti kata bahawa responden yang merupakan pemegang jawatan JDKS mewakili kelas responden yang tidak dinamakan yang merupakan ahli JDKS. Hakim perbicaraan tidak mengambil pendekatan kes tersebut atas dasar tindakan kelas yang dimulakan oleh tiga orang bagi pihak sekumpulan kecil orang yang tidak dinamakan. Ketiga-tiga responden di sini menyaman atas nama mereka sendiri serta dalam kapasiti mereka sebagai pemegang jawatan. Ia adalah jelas bahawa isu kapasiti representatif hanya

timbul berkenaan dengan hak JDKS sebagai entiti untuk menuntut ganti rugi. JDKS tidak mempunyai 'pegawai awam' yang didaftarkan di bawah s 9(c) Akta Pertubuhan 1973. Oleh itu, semua yang diputuskan oleh hakim perbicaraan dalam kes semasa adalah JDKS boleh diwakili oleh pemegang jawatannya yang merupakan responden. Berdasarkan premis tersebut, ini bukan tindakan representatif. Hakim bicara tidak mempertimbangkan plaintif yang tidak dinamakan yang merupakan ahli kelas dalam memberikan ganti rugi. Oleh itu, alasan rayuan ini adalah tanpa merit (lihat perenggan 38–40).

(5) Apa yang dilakukan oleh responden adalah memplidkan di samping perkataan 'makna semula jadi dan biasa' dan 'makna inferensial', perkataan 'sindiran'. Tiada fakta ekstrinsik atau khas untuk menyokong sindiran perundangan yang telah diplidkan. Oleh itu, responden telah menggunakan maksud popular sindiran secara longgar dan tanpa disedari telah memberikan gambaran telah juga memplidkan sindiran. Walau bagaimanapun, ini bukan isu dan tiada apa-apa yang menghidupkannya atas alasan mudah bahawa hakim perbicaraan tidak mendapati perayu-perayu bertanggungan atas kausa tindakan lain berdasarkan sindiran perundangan. Beliau hanya mendapati perayu bertanggungan atas fitnah berdasarkan makna semula jadi dan biasa perkataan yang diterbitkan. Tidak ada merit dalam alasan ini dan ia jelas bahawa hanya satu kausa tindakan telah diplidkan (lihat perenggan 43).

(6) Hakim perbicaraan tidak melakukan sebarang kekhilafan apabila mendapati pembelaan kewajaran gagal. Seksyen 8 Akta Fitnah 1957 tidak memperuntukkan tanpa syarat bahawa kewajaran separa adalah mencukupi. Kelayakan adalah bahawa pertuduhan yang tidak dibuktikan 'tidak mencederakan reputasi plaintif dengan mengambil kira kebenaran baki pertuduhan'. Tiada merit dalam hujah perayu bahawa pembelaan kewajaran berjaya (lihat perenggan 49–50).

(7) Walaupun dakwaan bahawa kemalangan tragis tersebut secara tidak langsung berpunca daripada keengganan responden untuk membenarkan pemain bola keranjang tersebut menggunakan dewan Siburan boleh dibaca sebagai ulasan, fakta asas yang mereka mesti buktikan adalah JDKS telah menghalangnya daripada menggunakan kemudahan mereka. Seperti dapatan oleh hakim perbicaraan fakta ini tidak dibuktikan kerana ibu kepada pemain bola keranjang tersebut memberitahu mahkamah bahawa rancangan anak perempuannya untuk pergi ke kampung Beratok adalah rancangan asal dan bukan rancangan alternatif. Ini adalah kenyataan fitnah dalam sembilan artikel seperti dapatan oleh hakim perbicaraan. Walau bagaimanapun, tiada fakta yang terbukti untuk membenarkan sebarang komen yang menyalahkan kematian pemain bola keranjang secara langsung atau tidak langsung ke atas responden atau JDKS. Oleh itu, hakim perbicaraan tidak terkhilaf

dalam menolak pembelaan ulasan berpatutan (lihat perenggan 55).

(8) Mahkamah bersetuju bahawa walaupun penerbitan tersebut secara jelas salah dan memfitnah, kebolehpercayaan bahawa perayu mempunyai pembelaan. Walau bagaimanapun, mengambil kira penggubalan ujian keistimewaan mutlak, elemen penting yang mesti dibuktikan terlebih dahulu ialah unsur timbal balik antara pembuat komunikasi dan penerima. Ia mesti dibuat pada kejadian istimewa. Sebarang kritikan yang munasabah pada suatu kejadian terhadap jawatankuasa eksekutif oligarki JDKS, seperti kekurangan ketelusan dalam memproses permohonan dan andaian yang salah tentang kematian pemain bola keranjang muda, tidak akan mengalahkan pembelaan keistimewaan mutlak selagi tiada niat jahat dan kepercayaan tersebut dipegang dengan jujur. Walau bagaimanapun, perayu telah melebihi hak keistimewaan mutlak kerana mereka mengadakan sidang media di mana sekurang-kurangnya empat akhbar Cina telah dijemput untuk menyiarkan rungutan mereka dan mengkritik jawatankuasa eksekutif JDKS. Justeru, komunikasi yang dimaksudkan tersebut dibuat bukan sahaja kepada penduduk kampung di Siburan tetapi kepada seluruh dunia. Berdasarkan premis tersebut, unsur timbal balik antara pembuat dan penerima komunikasi fitnah dari segi tugas atau kepentingan tidak wujud kerana komunikasi tersebut mungkin telah mencapai spektrum luas orang yang tidak dikenali setakatmana pertikaian mengenai keahlian JDKS. Oleh itu, defendan gagal dalam pembelaan keistimewaan mutlak dan keputusan hakim bicara untuk menolak pembelaan adalah betul (lihat perenggan 64–66).

(9) Aduan responden bahawa bagi setiap sembilan artikel, award ganti rugi yang berasingan sepatutnya diberikan oleh hakim bicara adalah tidak masuk akal. Perayu hanya mempengerusikan satu sidang media walaupun kenyataan mereka dilaporkan oleh empat akhbar Cina dalam sembilan artikel. Mengenai isu aduan kedua dalam rayuan balas bahawa setiap defendan sepatutnya diperintahkan membayar ganti rugi secara berasingan kepada setiap responden, hakim bicara mendapati tort telah dilakukan secara bersama oleh perayu pada sidang media tersebut. Oleh itu, tiada merit dalam hujah bahawa setiap perayu perlu diperintahkan membayar ganti rugi secara berasingan. Adalah memadai bahawa hakim bicara memberi pampasan kepada setiap responden dengan award ganti rugi yang berasingan. Hakim bicara juga telah menggunakan budi bicaranya dengan betul untuk tidak memberikan ganti rugi teruk kerana ketiadaan niat jahat di pihak perayu (lihat perenggan 73–76).]

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1966] 2 MLJ 66, FC (refd)
Abdul Rahman Talib v Seenivasagam & Anor [1965] 1 MLJ 142b (refd)
Adam v Ward [1917] AC 309, HL (refd)

Atip bin Ali v Josephine Doris Nunis & Anor [1987] 1 MLJ 82 (refd)
Chairman, Sarawak Housing Developers's Association v Malayan Banking Berhad [2009] MLJU 259; [2010] 10 CLJ 56, HC (refd)
Chew Peng Cheng v Anthony Teo Tiao Gin [2008] 5 MLJ 577, HC (refd)
Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor [2021] 2 MLJ 577; [2021] 4 CLJ 327, FC (refd)
Horrocks v Lowe [1972] 3 All ER 1098, CA (refd)
JB Jeyaretnam v Goh Chok Tong [1985] 1 MLJ 334 (refd)
Kemsley v Foot and Others [1952] 1 All ER 501, HL (refd)
Knupffer v London Express Newspaper Ltd [1944] 1 All ER 495, HL (refd)
Liu Thian Leong v Jee Nyen Chong (sued in his personal capacity and as an office-bearer of the Jawatankuasa Dewan Siburan (Siburan Hall Committee) under the provision of s 9(c) of the Societies Act 1966) & Ors and other suits [2013] 10 MLJ 398; [2014] 10 CLJ 511, HC (refd)
Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors [1999] 3 MLJ 529; [1999] 8 CLJ 499, HC (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (refd)
Sharifuddin Mohamed & Anor v Dato' Annas bin Khatib Jaafar [2016] MLJU 1729; [2016] 3 CLJ 574, CA (distd)
Sistem Televisyen Malaysia Bhd & Ors v Nurullah bt Zawawi & Anor [2015] 6 MLJ 703; [2015] 9 CLJ 357, CA (refd)

Legislation referred to

Defamation Ordinance 1957 ss 8, 9
Rules of Court 2012 O 59 r 16
Societies Act 1966 s 9(c)

Appeal from: Suit No 22–229 of 2010-I (High Court, Kuching)

Chong Siew Chiang (Ronald Ong and Michael Kong with him) (Chong Brothers Advocates) for the appellants.
Henry Ling (Ling & Wong Advocates) for the respondents.

Ravinthran JCA:

INTRODUCTION

[1] The appeal and cross-appeal originate from the trial of a counterclaim in a defamation suit in the High Court. The trial of the main claim was concluded much earlier on 4 January 2013. The counterclaim decision was delivered on 4 December 2017. Prior to the trial, parties agreed to be bound by the evidence adduced in the main claim trial. Due to the long interval between the main claim trial and the counterclaim trial, different High Court judges presided at the said trials. The judgment of the trial judge in the main trial is reported as *Liu Thian Leong v Jee Nyen Chong (sued in his personal capacity and*

as an office-bearer of the Jawatankuasa Dewan Siburan (Siburan Hall Committee) under the provision of s 9(c) of the Societies Act 1966) & Ors and other suits [2013] 10 MLJ 398; [2014] 10 CLJ 511. As we said earlier, the instant appeal is from the decision in the counterclaim. We shall refer to the judge who tried the counterclaim as the trial judge. Where necessary, we shall refer to the judge who tried the main claim as the main claim trial judge. As for the parties, the trial judge and counsel referred to the defendants in the main trial (Jee Nyen Chong, Voon Sam Ted and Chong Vui Kuet) as the plaintiffs and the plaintiffs in the main trial (Liu Thian Leong, Chong Jit Leong and Chang Hon Hiung) as the defendants. We shall do likewise.

BACKGROUND FACTS

[2] Like the counterclaim trial judge herein, we shall first refer to the facts that were summarised by the main claim trial judge to place in context the issues that arise in this appeal.

[3] The facts underpinning the action arose in Siburan. It was once a village located near Kuching, Sarawak. By the time of this action, it had prospered into a small town. In 1973, some of the villagers registered a society called Siburan Village Hall Committee ('SHC'). The executive committee consisted of a chairman, a vice-chairman, an honorary secretary, an honorary assistant secretary, a treasurer, an assistant treasurer and five ordinary members. The main purpose was to raise funds, construct and run a hall for the benefit of villagers. In due course, with funds from a government grant and public donations, a three-storey building was constructed. It housed a multipurpose hall and a basketball court (the Siburan Hall). Membership of the SHC was on paper open to all villagers, subject to the approval of the executive committee of SHC.

[4] During the trial, it was alleged that the initial membership of 20 had dwindled to only ten in 2010. It was also alleged that the SHC had practised discrimination in respect of the use of the facilities of the Siburan Hall. However, the event that set off a chain of events that led to litigation was a tragedy that took the life of a young female basketball player from Siburan. It was alleged by some residents that she was not allowed to use the Siburan Hall for training. Therefore, she travelled to a nearby village by the name of Beratok. On her way back to Siburan, she died in a road accident. Sometime after this accident, the SHC received a letter of demand from 190 villagers to be admitted as members and for facilities of the Siburan Hall to be opened up to the residents. The SHC did not accede to this request.

[5] A dialogue was held between Siburan residents and the executive committee of the SHC on 30 April 2008. It was initiated by Dr Jerip Susil who

was a member of the Sarawak State Legislative Assembly at the material time. The SHC was at that time headed by one Penghulu Boon Jim Lim. But he passed away sometime later and thus was not a party or a witness in the trial that followed. Penghulu Boon and the disgruntled residents apparently agreed for a 'sub-committee' to be established to look into the recruitment of new members. The 'sub-committee' was established on the same day with Liu Thian Leong as chairman, Chang Hon Hiung as secretary and Liew Kuet Min as treasurer. Pursuant to this dialogue, a total of 50 applications by Siburan villagers were submitted to the executive committee. Among the applicants were Liu Thian Leong, Chong Jit Leong and Chang Hon Hiung (the defendants herein). All the applications were rejected by the SHC as the form used was not proper. The applications were re-submitted. Again, all applications were rejected by the executive committee of the SHC. This time, no reason was given for the rejection.

[6] Disappointed, the defendants held a press conference on 22 July 2010 to which members of the Chinese media were invited. They gave vent to their frustration about the decision of the executive committee not to accept new members. The executive committee responded by issuing a press statement called the 'Notification' that was signed by its secretary, Voon Sam Ted. In the said 'Notification', the executive committee said that the defendants had caused misunderstanding, created dissatisfaction, hatred amongst the people in the village and damaged the reputation of the executive committee of SHC. The executive committee also said that the membership applications did not comply with prescribed procedure. The applicants were invited to claim for a refund of the membership fee.

MAIN CLAIM

[7] The defendants took exception to the said press statement. Each of them filed a separate defamation action against the main office-bearers of the SHC, ie, Jee Nyen Chong, Voon Sam Ted and Chong Vui Kuet (the plaintiffs herein), who were chairman, secretary and treasurer of the executive committee. They were sued in their 'personal capacity' as well as 'office-bearers' of the SHC. All the suits were subsequently consolidated by the court. Thus, in the main action, Liu Thian Leong, Chong Jit Leong and Chang Hong Hiung became the first, second and third plaintiffs. Jee Nyen Chong, Voon Sam Ted and Chong Vui Kuet remained as the first, second and third defendants. The main claim trial judge found for Liu Thian Leong, Chong Jit Leong and Chang Hon Hiung (the defendants herein) and awarded them damages in the sum of RM60,000, RM40,000 and RM40,000 respectively. The main claim trial judge also ruled that Jee Nyen Chong, Voon Sam Ted and Chong Vui Kuet (the plaintiffs herein) were not personally liable as the publication was made by the executive committee of the SHC. The SHC was ordered to pay the damages.

THE COUNTERCLAIM

[8] The main claim had to do with the press statement (the so-called 'Notification') issued by the SHC in response to the press conference presided by the defendants. The counterclaim against the instant defendants was based on nine articles in the four Chinese newspapers that resulted from the said press conference. Because of the order of the High Court for a split trial and pending interlocutory appeals, the counterclaim trial only concluded in 2020. It must also be mentioned here that at the outset of this appeal, the parties indicated that they had no objection to the Court of Appeal panel member (judicial commissioner at that time) who ordered the split trial during case management.

[9] All nine articles resulted from the press conference presided by Liu Thian Leong, Chong Jit Leong and Chang Hon Hiung (the defendants herein). They are set out in extenso in the pleadings and the judgment of the learned trial judge. The counterclaim of Liu Thian Leong, Chong Jit Leong and Chang Hon Hiung (the plaintiffs herein) is that the said press conference caused the publication of the nine articles. The plaintiffs pleaded that the defendants maliciously invited the four Chinese papers to publish the defamatory words and thereby greatly injured their reputation in their personal capacity as well as persons in charge of the SHC.

THE DEFENCE

[10] The defendants denied that the words complained of in the nine articles referred to the plaintiffs. They denied that the words in the natural and ordinary meanings and/or by way of innuendo or inferential meaning were defamatory. The defendants prayed for the claim that relied on the innuendo meaning to be struck out because essential extrinsic facts and the identity of persons to whom it was published were not disclosed. The defendants also pleaded that SHC cannot sue for libel without proof of special damages because it is a society. The defences of justification, fair comment and qualified privilege were also pleaded.

DECISION OF HIGH COURT

[11] The learned trial judge found that the words complained of in the nine articles were capable of and were defamatory of the plaintiffs. She also found that the defences of justification, fair comment and qualified privilege were proven. She found that malice was not relevant as the defences failed but on the facts of the case, she found that it was not proven by the plaintiff. However, in her written grounds of judgment which was written sometime after her decision was pronounced, Her Ladyship said that she erred in finding that the

defence of qualified privilege failed. Nonetheless, she acknowledged that she cannot revisit her decision. In respect of general damages, she awarded RM60,000 in favour of Jee Nyen Chong (first plaintiff). As for Voon Sam Ted and Chong Vui Kuet, she awarded general damages of RM40,000 to each of them. She also awarded the SHC, a sum of RM40,000 as general damages. In respect of costs, she made a global award of RM60,000.

ISSUES IN THE APPEAL

[12] The defendants appealed against the whole of the decision of the trial judge, whereas the plaintiffs filed a cross-appeal.

[13] Counsel for the defendants has reduced the 20 grounds of appeal in the memorandum of appeal to the following seven:

(1) Whether the words complained of, in the natural and ordinary meaning, were defamatory of the Respondents personally or were capable of referring to the Respondents personally and/or of them in their official capacities of SHC?

(2) Whether the plea formulated in Para 30 of the Amended Counter-Claim, ie (the words complained of in their natural and ordinary meaning, and, or by way of innuendo) were two causes of action, and whether the innuendo cause of action ought to be dismissed?

(3) Whether the LTJ erred in law and in fact in dismissing the plea of qualified privilege?

(4) Whether the LTJ erred in law and in fact in dismissing the defence of fair comment?

(5) Whether the LTJ erred in law and in fact in dismissing the defence of justification?

(6) Whether the Respondents have the right to bring a representative action for damages in defamation against the Appellants under Order 15 Rule 12 of the Rules of Court 2012?

(7) Whether the damages awarded were excessive and/or unjustifiable?

[14] In the cross-appeal, the plaintiffs who are not satisfied with the global nature of the awards made against the defendants have raised the following issues which we summarise below:

(1) That the trial judge should have held each of the defendants liable separately to each of the plaintiffs and SHC.

(2) That each of the nine articles in the four Chinese newspapers was a separate publication which constituted a separate tort and the award of damages should reflect it instead of making a global award.

(3) Therefore, damages in the sum of RM60,000 should be granted to the first plaintiff for each of the said nine articles. Likewise, the other plaintiffs should be granted RM40,000 for each of the nine articles. SHC should also be granted damages on the same basis.

(4) That the award of damages should be varied to include aggravated damages.

(5) That contrary to the finding of the learned trial judge, the plaintiffs proved actual malice in this case.

(6) The costs of RM60,000 was inadequate.

[15] Thus, having regard to the main points of the memorandum of appeals and the submission of the parties, the main issues in the appeal and cross-appeal are as follows:

(a) whether there was a reference to the plaintiffs?

(b) whether the words complained of are defamatory?

(c) whether representative action?

(d) whether pleading is based on two causes of action?

(e) whether qualified privilege, fair comment and justification are proven?

(f) malice;

(g) damages; and

(h) costs.

Whether words complained of referred to plaintiffs?

[16] We shall first summarise the alleged defamatory imputation contained in the nine long articles in question that were reproduced in the pleadings and the judgment of the learned trial judge. All the nine articles constitute reports arising from the press conference presided by the defendants. The articles reported the complaint of the defendants at the press conference that the plaintiffs, as office-bearers of the SHC, had rejected the applications for membership by 50 Siburan residents without an explanation. The plaintiffs had continued to run the SHC with a dwindling membership of only ten without any transparency although the funds to build it were sourced from public and government donations.

[17] In the International Times report dated 23 July 2019, it is stated that the SHC did not practise transparency and that their action caused an outrage among the villagers. It was also stated that the refusal to open the basketball court to the villagers resulted in a tragedy that claimed a student's life.

[18] In the *Sin Chew Daily* dated 23 July 2010, the report on the press conference stated that the management did not practise transparency when they rejected the membership application of the villagers. The report also stated that the refusal of the SHC to open the basketball court resulted in the death of a student as she died in an accident on her way back from training in the basketball court of a neighbouring village. The report also stated that the SHC had used different excuses to ask applicants to collect their refund of the RM50 membership fee. It also stated that Siburan residents condemned the SHC for their unreasonableness and lack of transparency in managing the hall.

[19] In the *United Daily News* report dated 23 July 2010, it was stated that the rejection of the membership applications caused an outrage among the villagers. In another report in the same paper, it was stated that the refusal of the SHC to open the basketball court to the public caused a 'deadly car accident'. The report also stated that the residents of Siburan 'blasted' the SHC for their 'ill management and improper way of running the hall'. It stated that the villagers bombarded the SHC for their lack of transparency and for unreasonably refusing to admit new members.

[20] In the *See Hua Daily News* publication dated 23 July 2010, it was reported that Liu Thian Leong said that Siburan Hall was run by an exclusive group in a 'black box' and that it was not 'transparent'. The incident about the young student who was forbidden from training at the basketball court was also mentioned. In another report in the same newspaper, it was mentioned that the accident that caused the death of the student resulted in Siburan residents submitting a petition to the SHC to open up its membership.

[21] Counsel for the defendants argued that the nine articles do not refer to the plaintiffs in their 'personal and private character'. None of the reports mention the second and third plaintiffs by name. Only the first plaintiff (Jee Nyen Chong) is named in three articles. But he was referred to in his official capacity as an office-bearer of the SHC. In any event, all the words of the articles are directed at the SHC as a whole and not to the plaintiffs individually. In support, he cited the case of *Sharifuddin Mohamed & Anor v Dato' Annas bin Khatib Jaafar* [2016] MLJU 1729; [2016] 3 CLJ 574 where Zaleha Yusof J said as follows:

> [8] We have read the impugned article. With due respect to the learned trial judge, we cannot find any reference to the respondent/plaintiff at all in it. It merely refers to 'pengurusan' (management). As submitted by learned counsel for the appellants/defendants, any reference to the management cannot be taken to mean reference to the respondent/plaintiff singularly as management does not comprise solely of the respondent/plaintiff but of several people.

[22] Counsel for the plaintiffs submitted that the learned trial judge correctly found that there is a reference to the plaintiffs as the first plaintiff is mentioned by name in three of the nine articles and all the plaintiffs belong to a small class or group who can be identified.

[23] The learned trial judge's finding on this issue was as follows. Her Ladyship referred to the well-known House of Lords case of *Knupffer v London Express Newspaper Ltd* [1944] 1 All ER 495, where it was held that a plaintiff may succeed in an action for libel even if he is not named but the words of the publication can be regarded as capable of referring to him. In the *Knupffer* case, the plaintiff was the head of the *Young Russia Movement* in the United Kingdom. There were only 24 members in the United Kingdom but thousands worldwide. The publication in question defamed the *Young Russia Movement* but did not refer to the plaintiff or the branch in the United Kingdom. The action failed as the words spoke of a class of persons and nothing in the words referred to the plaintiff as an individual.

[24] Nonetheless, the House of Lords discussed the test to apply when deciding whether a plaintiff is referred to in a publication in which he is not specifically named. Viscount LC, who wrote the leading judgment, said as follows:

> Where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to. There are cases in which the language used in reference to a limited class may be reasonably understood to refer to every member of the class, in which case every member may have a cause of action.
>
> ... There are two questions involved in the attempt to identify the appellant as the person defamed. The first question is a question of law — can the article, having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of fact, namely, does the article in fact lead reasonable people, who know the appellant, to the conclusion that it does refer to him? Unless the first question can be answered in favour of the appellant, the second question does not arise, and where the trial judge went wrong was in treating evidence to support the identification in fact as governing the matter, when the first question is necessarily, as a matter of law, to be answered in the negative.

[25] In considering the question of law on this issue, Her Ladyship noted that the nine articles used the words 'Siburan Hall Management', 'Siburan Hall Committee and Management', 'Siburan Community Hall Management', 'Siburan Community Hall Committee', 'Siburan Hall'. It was pleaded and evidence was led that the plaintiffs were the principal office-bearers as Chairman, Secretary and Treasurer. As the executive committee of the SHC comprised only 11 persons and the plaintiffs were the key persons in charge of

management, the learned trial judge found that the articles were capable of referring to the plaintiffs. We are mindful that in the nine articles in question, it was reported that the membership of SHC had dwindled to ten. Nonetheless, the evidence was tendered that there were 11 committee members.

[26] The next question Her Ladyship answered was whether, on the evidence, the articles in question would lead reasonable people who knew the plaintiffs to conclude that they referred to them. She had regard to the fact that the plaintiffs pleaded that the plaintiffs were key office-bearers in charge of the management of the SHC which constituted of only 11 persons and that reasonable people believed that the plaintiffs were referred to in the articles in question. She also considered the evidence tendered on this point. The plaintiffs testified that they were well recognised among the Siburan public as being persons in charge of the SHC. The learned trial judge also referred to the evidence of the first defendant on this point. Liu Thian Leong (first defendant) agreed during cross-examination that the SHC was a small group comprising the plaintiffs and that this fact is known to the Siburan public.

[27] We find that the learned trial judge correctly directed herself on the law with regard to plaintiffs who are not named in a defamatory publication. Counsel for the defendants failed to cite any authority that says that plaintiffs must in all cases be named in a defamatory publication to be clothed with the right to sue. *Gatley on Libel and Slander*, the authoritative work on defamation law that is often cited in our courts, also states a person who is not named in a defamatory publication may sue. The learned trial judge quoted the following passage from the 11th Ed, para 7.2 at [213] which sums up the position as follows:

> But although the claimant is not named in words, he may, nevertheless, be described so as to be recognised; and whether that description takes the form of a word-picture of an individual or the form of a reference to a class of persons of which he is or is believed to be a member, or any other form, if in the circumstances the description is such that a person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to, that is a sufficient reference to him' per Isaacs J. in *David Syme v Canavan* (1918) 25 CLR 234 at 238; *Lawrence v Newberry* (1819) 64 LT 797; *Shah v United African Press* [1961] EA 93; *Raul Amon International Pty Ltd v Telstra Corp* [1998] 4 VR 798 Vict CA.

[28] The case of *Sharifuddin Mohamed & Anor v Dato' Annas bin Khatib Jaafar* cited by counsel for the defendants is clearly distinguishable. In that case, the defamatory imputation concerned graft allegations pertaining to the award of a contract by the Lembaga Kemajuan Ikan (LKIM). The article that was published did not refer to the respondent who was the director-general of LKIM. The article itself was a regurgitation of a report made by the Chairman

of LKIM to the Anti-Corruption Agency. The report merely referred to the 'pengurusan' or management. The High Court held that the article referred to the respondent. The Court of Appeal considered the *Knupffer* case but held that on the facts, reasonable people would not think that the article referred to the respondent. The reason is found in para [17] of the judgment of the Court of Appeal. The matters reported in the defamatory publication occurred before the appointment of the respondent. The relevant passage in the judgment is as follows:

> [17] We agree with the appellants/defendants submission that reasonable people who know the plaintiff/respondent would not come to the conclusion that the impugned article referred to the plaintiff/respondent for the same reason as in the Berita Harian case that the matters reported in the impugned article occurred before his appointment as Director General of LKIM.

[29] In the instant case, the learned trial judge referred to the evidence of both the plaintiffs and the defendants. As we pointed out earlier, even the first defendant agreed that the SHC is a small group that comprises the plaintiffs and that this fact is known to the public in Siburan. In the premises, the learned trial judge very properly made a finding of fact that the plaintiffs are the persons referred to in the nine articles which criticised the conduct of the SHC. In any event, insofar as the first plaintiff is concerned, he was named in three of the articles and therefore his identification as one of the persons who was referred in the said articles is unassailable. Therefore, we find that there is no merit in the ground of appeal that the plaintiffs were not referred to in the articles in question.

Whether publications referred to plaintiffs in their official capacities?

[30] Having argued that the publications in question do not refer to the plaintiffs personally, counsel for the defendants also argued that plaintiffs were not referred to in their 'official' capacities as only the SHC was targeted in terms of public accountability and transparency in managing the Siburan Hall. The learned trial judge addressed this point and dismissed it. We do not find any merit in this point either. Our reasons are as follows.

[31] The defendants who were the plaintiffs in the main claim sued the plaintiffs herein 'in their personal capacity' and as 'officer-bearers' of SHC. When the plaintiffs herein filed the counterclaim, they sued in their personal capacity and as office-bearers of the SHC. In addition, they also stated in the counterclaim that they also suing to protect the reputation of SHC. All these appear from the intitulement and the pleadings. We have referred to a summary of the contents of the said nine articles in the preceding passages. Although only three of the articles mentioned the name of Liu Thian Leong, all the articles consistently referred to the management or committee of the

Siburan Hall which is a small group of people. This is the reason the learned trial judge found that the plaintiffs are identifiable in the nine publications. Therefore, it follows, the articles also refer to the plaintiffs in their official capacities. This does not mean that the plaintiffs as individuals are not entitled to the protection of their private reputation as held by the learned trial judge. We, therefore, find no merit in this ground of appeal. The articles referred to the plaintiffs personally as well as in their official capacities in the executive committee of the SHC.

Whether defamatory

[32] The plaintiffs herein pleaded in para [30] of the defence and counterclaim that the articles and news reports 'in their natural and ordinary meanings, and, or by way of innuendo or inferential meaning are capable of bearing the following meanings:

(1) The plaintiffs in their personal capacity, Siburan Hall Committee and/or as official bearers in charge of the management of the Siburan Hall had abused their respective position as Chairman, Honorary Secretary and Treasurer of the Siburan Hall Committee and/or the Siburan Hall;

(2) The plaintiffs had acted in a dishonest manner in executing their duties, using and managing the Siburan Hall;

(3) The plaintiffs were guilty of criminal misappropriation of monies or had committed a serious offence or were guilty of conduct punishable as criminal offence;

(4) The plaintiffs were incompetent to hold their respective offices or be office-bearers of the Executive Committee of the Siburan Hall Committee;

(5) The plaintiffs were unscrupulous, ruthless, dishonourable, selfish and greedy persons for not approving the purported 50 membership applicants; and/or refusing other people or students to use the basketball court at the Siburan Hall;

(6) The plaintiffs were hypocrite or untrustworthy persons in promising the conditionally acceptance of the membership applicants and yet turn down the 50 membership applications after dragging for two years;

(7) The plaintiffs were not fit to hold any office of the Siburan Hall Committee;

(8) The plaintiffs were mischievous or wicked persons unworthy of their status as office-bearers of the Siburan Hall Committee;

(9) The plaintiffs failed to comply with the law and/or the Rules and Regulations in dealing with the new membership applications;

(10) The conduct of the plaintiffs were discreditable, and dishonourable and immoral persons, and or guilty of non-accountability, non-transparency and dictatorship;

(11) The plaintiffs had abused their offices as office-bearers of the management and/or Executive Committee of the Siburan Hall Committee and/or Siburan Hall in dealing with the membership applications;

(12) By the aforesaid impugned statements, the defendants have directly or indirectly imputed that each of the Defendants [plaintiffs] was a person with a dishonourable or discreditable conduct or motive in the way of his status, office or calling and that he was a person lack of integrity or otherwise implied that each of the Defendants [plaintiffs] was unscrupulous, ruthless, dishonourable and selfish.

[33] The learned trial judge held that the imputation in the nine articles was capable of a defamatory meaning. Her Ladyship's finding is summed up in the following para [115] of the judgment:

> I was satisfied that an ordinary reasonable person who read the words complained of in the articles as a whole would naturally infer or impute dishonorable or discreditable conduct or motive and a lack of integrity on the part of the management and office-bearers of the SHC, namely, the plaintiffs in managing and running SHC. An ordinary reasonable reader of the words complained of would interpret them within the range of imputation or defamatory meanings as pleaded in para 30 of the Counterclaim. This includes inferring and imputing that the plaintiffs had abused their positions and acted in a dishonest and dishonourable manner in managing and running the Siburan Hall; that they were incompetent, unfit and unworthy to hold office; that they were unscrupulous, ruthless, greedy and untrustworthy for rejecting the membership applications and for refusing other villagers or students from using the basketball at the Siburan Hall resulting in a deadly road accident that took the life of a young basketball player; and that they were guilty of hypocrisy, non-accountability, non-transparency and dictatorship in dealing with the new membership applications. I think there could be no doubt that to say of the plaintiffs all these would have the effect of lowering them in the estimation of right-thinking members of society generally. Therefore, it was my finding in law that the words complained of were capable of being defamatory.

[34] Her Ladyship also found in para [119] that as a matter of fact, the imputations contained in the nine articles defamed the plaintiffs. The finding is as follows:

> It is also quite apparent as a matter of pure fact that the words complained of defamed the plaintiffs and the SHC. The sting or imputations at the heart of the words complained of are the allegations and implications of lack of integrity, abuse of position, ignorance of the local residents' rights, lack of transparency, ill management, and acting in a ruthless, dishonourable, and untrustworthy way in managing and running the Siburan Hall and with the accusation that the refusal to open the hall had led to the loss of a young person's life. With such allegations or

implications, no reasonable man would have found the words complained of to be anything else other than being defamatory of the plaintiffs.

[35] The point made by counsel for the defendants was that the nine articles were not defamatory of the plaintiffs because the accusations found therein were directed at the office held by them and therefore, it targeted the SHC. Counsel argued that the remarks in the nine articles questioned the transparency and the public accountability of the SHC in dealing with membership applications and the issue of the opening up of the basketball court for public use. It was submitted that on the evidence, the SHC had acted reasonably and not arbitrarily in these matters. Thus, it follows that questioning public figures in order to hold them to account in respect of the discharge of their duties cannot be defamatory. In support, counsel for the appellant cited the case of *Chew Peng Cheng v Anthony Teo Tiao Gin* [2008] 5 MLJ 577. The brief facts of the case are as follows. The plaintiff was chairman of a company that had been set up for the benefit of members of a private society known as Chiang Chuan Association. The plaintiff also headed the Chiang Chuan Association. The defendant who became chairman later wrote two letters questioning the decision of the plaintiff in relation to the conversion of a parcel of land belonging to the Chiang Chuan Association from agricultural to commercial land after the construction of the petrol station. The defendant alleged that the plaintiff had betrayed the trust bestowed upon him by the association by putting the association's land in jeopardy by his actions. The High Court found that the defences of justification, fair comment and qualified privilege succeeded. In respect of the of issue whether the letters were defamatory, the court said as follows:

> I do not think the words complained of can be construed as defamatory in this time and era where public perception to accountability, transparency, good governance in respect of people holding office, or position, or who get involved in the affairs of organisation such as associations has become more and more, a subject matter of critical scrutiny by the public or by those who are associated with it.

[36] In our opinion, the defendants cannot rely on the above-mentioned passage to argue that the criticism in respect of the management of an organisation can never be defamatory. The overall defamatory sting in the entire publication must be looked at closely. In the instant case, as found by the learned trial judge, the articles as a whole imputed dishonourable or discreditable conduct and lack of integrity on the part of the SHC of which the plaintiffs were office-bearers. Further, it was suggested in the articles that the actions of the SHC indirectly caused the death of a young basketball player. Counsel for the appellant submitted that the correct English translation in the articles was that it 'led to the death' instead of 'caused the death' in the article in question. We see little difference in the translation as all the same, the SHC was blamed for the death of the young basketball player. For the reasons given by

the learned trial judge in the passages we quoted above, we see no error on her part in finding that the imputations contained in the nine articles were defamatory of the plaintiffs and the SHC. This ground of appeal is therefore without any merit.

Whether representative action

[37] Counsel for the defendants submitted that the trial judge erred in holding that the plaintiffs had a right to bring a representative action in libel for damages. He cited the case of *Atip bin Ali v Josephine Doris Nunis & Anor* [1987] 1 MLJ 82 where Wan Yahya J (as he then was) said as follows:

> Lastly, I am of the view that representative proceedings cannot be taken in defamation proceedings. No representative action is normally allowed to establish the right of numerous persons to recover damages as the sole relief claimed. In a defamation suit the ground of liability for damages must necessarily differ from one person to another.

[38] We agree with the submission of counsel for the defendants that a representative action cannot be taken in defamation proceedings. The reason that counsel for the defendants has raised this as a ground of appeal is the following passage in the judgment of the trial judge:

> [69] In response Mr Henry Ling said that the plaintiffs had testified unequivocally that they were at the material time (and still are) the respective office-bearers of SHC. Looking at the title of the writ, the contents of the pleadings and evidence at the trial, the only fair conclusion is that the counterclaims were commenced both in personal action and in a *representative capacity* as office-bearers of SHC. (Emphasis added.)

[39] However, although the learned trial judge used the term 'representative capacity', it is clear in her judgment she did not use it in the sense that the plaintiffs who are office-bearers of the SHC were representing a class of unnamed plaintiffs who are the members of the SHC. The learned trial judge did not approach the case on the basis that it was class action instituted by three persons on behalf of a small group of people who were not named. All three plaintiffs herein sued in their own names as well as in their capacity as office-bearers. In fact, in the main action, it is the defendants herein who as plaintiffs sued the plaintiffs herein in that fashion. Although, the learned trial judge did discuss whether the plaintiffs are representing all the members of the SHC, it is clear that the issue of representative capacity only arose in respect of the right of the SHC as an entity to claim for damages. It was not disputed that SHC did not have 'a public officer' registered under s 9(c) of the Societies Act 1966. It is for this reason that the Federal Court case of *Chairman, Sarawak Housing Developers's Association v Malayan Banking Berhad* [2009] MLJU 259; [2010] 10 CLJ 56 was cited by the trial judge. The Federal Court held

that an office-bearer may file a suit on behalf of the association if no public officer is registered under s 9(c) of the Societies Act 1966. Thus, all that the trial judge decided in the instant case was that SHC can be represented by its office-bearers who are the plaintiffs. This is clear from the final two paragraphs of her judgment on this issue:

> [73] I am bound by the decision of the Federal Court above. Notwithstanding that no proper public officer of SHC had been declared and registered under section 9(c) of the Act for the purpose of suing in the present action, it is permissible for the plaintiffs, as office-bearers of SHC to mount a claim for and on behalf of SHC ...
>
> [74] On this account alone, I was of the view that this action in so far as it is an action for libel by SHC in the name of its office-bearers, is maintainable in law.

[40] In the premises, this was not a representative action in the sense that an entire class of unnamed plaintiffs was represented by the named plaintiffs. All that we see here is that the plaintiffs represented themselves and the SHC of which they are office-bearers. Her Ladyship only gave an award of damages to the named plaintiffs and the SHC. Whether the trial judge correctly granted an award of damages to the individual office-bearers as well as the SHC is another issue that we shall address later. But the important point to note in relation to the above-mentioned ground of appeal is that the trial judge did not consider unnamed plaintiffs who are members of a class in awarding damages. Therefore, this ground of appeal is without any merit.

Whether pleading is based on two causes of action?

[41] In para 30 of the counterclaim, the plaintiffs pleaded the following words in the opening line when asserting the defamatory meanings of the nine articles in question:

> 30 In their natural and ordinary meanings, and, by *way of innuendo* or inferential meaning of the said or similar words ... (Emphasis added.)

[42] Counsel for the defendants advanced a ground of appeal that the plaintiffs had pleaded 'two causes of action' in para 30, ie, one defamation action based on the natural and ordinary meaning of words and another based on innuendo. However, since no special or extrinsic facts to support innuendo was pleaded, the 'innuendo cause of action' should be struck out.

[43] The learned trial judge agreed that 'legal' or 'true' innuendo in a defamation action gives rise to a separate cause of action. However, she reasoned that only a defamation action based on the natural and ordinary meaning of the words was pleaded in para 30. We see no error on her part. All that the plaintiffs herein did in para 30 was to plead alongside the words 'natural and ordinary meaning' and 'inferential meaning', the word 'innuendo'.

No extrinsic or special facts to support a legal innuendo were pleaded. Furthermore, the 11 meanings pleaded in para 30 are based on natural, ordinary or inferential meanings of the imputations contained in the nine articles. Thus, it is obvious that the plaintiffs herein had loosely used the popular meaning of innuendo and had unwittingly given an impression of having pleaded innuendo as well. Nonetheless, we should think that this is a non-issue and nothing turns on it for the simple reason that the learned trial judge did not find the defendants liable for another cause of action based on legal innuendo as well. She only found the defendants liable for defamation based on the natural and ordinary meaning of the published words. Furthermore, there is no suggestion that a cause of action based on natural and ordinary meaning was not properly pleaded. We find no merit in this ground and it is clear that only one cause of action was pleaded.

JUSTIFICATION

[44] The learned trial judge directed herself that in order to succeed on the defence of justification, the defendants need not prove every statement in the nine articles but must establish the truth of the material statements. She quoted the following passage from the well-known Federal Court case of *Abdul Rahman Talib v Seenivasagam & Anor* [1966] 2 MLJ 66 which addressed the common law plea of justification as well as s 8 of the Defamation Ordinance 1957 (now Defamation Act 1957):

> Where the plaintiff proves publication of defamatory words it is for the defendant if he wishes to set up the defence of justification to plead and prove the facts on which he relies to show justification. It is for the defence to show that the defamatory imputation is true. See *Belt Lawes* (1882) 51 LJ QB 359.
>
> At common law, under the plea of justification, the defendant must prove the truth of all material statements in the libel. There must be a substantial justification of the whole libel. If any material part were not proved true the plaintiff would be entitled to damages in respect of such part, provided, of course, that it would by itself form a substantial ground for an action for libel. By s 8 of the Defamation Ordinance, 1957, however, it is now provided that in an action for libel or slander in respect of words containing two or more distinct charges, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation, having regard to the truth of the remaining charges.

[45] Based on the above direction, Her Ladyship held that where the unproved charge is more serious in nature than the charges proved to be true, the unproved charge is taken to have materially injured the reputation of the claimant. In respect of the serious charges in the instant case that were not proven, she singled out two. She found that the allegation that the refusal of the SHC to open the basketball to the public indirectly caused the death of a young

girl was not true. The second serious charge she identified is that the plaintiffs were unreasonable and lacked transparency in managing the Siburan Hall and had covertly altered its name from Community Hall to Siburan Hall and that this caused unhappiness among the villagers.

[46] The learned trial judge considered the evidence of the mother of the deceased young girl who allegedly died because she had to travel to another village to use a basketball court. The mother testified that the decision of her daughter to travel to another village was the original plan. It was not an alternative plan because her daughter was prevented from using the Siburan Hall. A friend of the deceased gave similar evidence. For this reason, the trial judge found that the serious charge against the plaintiffs in relation to the tragic death of the said young girl was not proven.

[47] In respect of the second serious charge in respect of the management of the Siburan Hall and the unhappiness of the villagers, the trial judge found that it was not proven. She also found that there was no evidence that the villagers were unhappy that the name of the hall was changed to Siburan Hall from Community Hall. Therefore, she found that the defence of justification failed in respect of the unproved charges that materially injured the reputation of the plaintiffs.

[48] Counsel for the defendants submitted that there were sufficient true facts to justify the charges. He submitted that the following are the true facts for the purpose of the defence of justification. We shall summarise the lengthy facts that allegedly support the defence of justification. A young girl was killed in a road traffic accident on 9 March 2008 after a basketball game in a neighbouring village. It sparked an outrage. The villagers demanded that the management of SHC be improved by admitting new members. They also demanded the Siburan Hall be opened for use by the villagers. A joint meeting was held with villagers and Penghulu Boon Jim Lim and YB Dr Jerip Susil. A resolution was passed to look into new membership. The villagers submitted their membership applications following this meeting. The SHC challenged the authority of Penghulu Boon Jin Lim. The villagers were asked to re-submit the application forms but membership was not approved. No explanation was given. Counsel for the defendants submitted that partial justification is a complete defence under s 8 of the Defamation Act 1957.

[49] In our view, the learned trial judge did not commit any error when she found that the defence of justification failed. Section 8 of the Defamation Act 1957 does not provide unreservedly that partial justification is sufficient. The qualification is that the unproved charges 'do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges'. In the Federal Court case of *Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v*

Nurul Izzah bt Anwar & Anor [2021] 2 MLJ 577; [2021] 4 CLJ 327, the import of s 8 was explained in the following passage:

> [41] What this means is that it is not necessary to prove the truth of every defamatory allegation if the words not proved to be true do not materially injure the plaintiff's reputation. In short, there only needs to be substantial justification of the whole libel and it is not necessary to prove the truth of every word of the libel. 'As much must be justified as meets the sting of the charge, and if anything be contained in a charge which does not add to the sting of it, that need not be justified. (see *Workers' Party: Tay Boon Too; Workers' Party v Attorney-General* [1975] 1 MLJ 47; [1974] 1 LNS 206).

[50] The learned trial judge found that blaming the SHC for the death of the young basketball player in question and accusing them of running the Siburan Hall without transparency were the more serious charges that injured the reputation of the plaintiffs. It may well be that the plaintiffs herein had proved that a committee had been formed by the villagers in the meeting with Penghulu Boon Jim Lim to look into admitting new members and that the plaintiffs had, without any explanation, rejected the membership applications. However, the overall defamatory sting of the nine articles was in the two serious charges pointed out by the learned trial judge. We had earlier mentioned that that insofar as the death of the young basketball player was concerned, based on the evidence of her mother and a close friend, the plaintiffs proved that the SHC did not turn her away from using the Siburan Hall. In respect of the management of Siburan Hall and the issue of transparency, the only issue on which the defendants had knowledge was about the refusal of the SHC to admit new members. The learned trial judge also found that no evidence was tendered to support that the charge that the villagers were unhappy with the way the Siburan Hall was being run. We see no reason to interfere with the finding of facts on these issues as it has not been demonstrated how Her Ladyship had erred or misdirected herself as the primary trier of facts. We, therefore, see no merit in the argument of the defendants that the defence of justification succeeded.

FAIR COMMENT

[51] The learned trial judge cited the cases of *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334 and *Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors* [1999] 3 MLJ 529; [1999] 8 CLJ 499 and directed herself that the following elements must be established in order to succeed in a defence of fair comment:

(a) That the words complained of are comments, though they may consist of or include inference of facts;

(b) That the comments are on a matter of public interest;

(c) That the comments are based on facts; and

(d) The comments are fair and which a fair-minded person can honestly make on the fact proved;

[52] The learned trial judge found that the publications in question were on a matter of public interest. However, she found that the words complained of were not comments based on facts and secondly were not comments which are fair and which a fair-minded person can make on proved facts. Her Ladyship found that the damning accusation in the press reports that the refusal of the SHC to open up basketball court to the Siburan public led to the death of the young basketball player to be a statement of fact and not a comment. She found that the said statement of fact to be a 'total falsehood' on the evidence that we referred to earlier.

[53] Counsel for the defendants referred to a passage from the judgment of Lord Porter in *Kemsley v Foot and Others* [1952] 1 All ER 501 and submitted that not every allegation of fact on which comment is based needs to be proved. However, as correctly pointed out by the learned trial judge, 'allegation of fact' in the said passage refers to particulars pleaded to support the defence of fair comment in the statement of defence. It does to refer to a fact found in the libellous publication. The said passage was cited and commented upon in the case of *JB Jeyaretnam v Goh Chok Tong* by Thean J:

> Secondly, for a defence of fair comment to succeed it is not necessary to prove each of the facts pleaded in support; all that is needed is to prove such of the facts as are sufficient to form the basis of a fair comment. Lord Porter in *Kemsley v Foot* said at p 358:
>
> > In the present case, for instance, the substratum of fact upon which comment is based is that Lord Kemsley is the active proprietor of and responsible for the Kemsley Press. The criticism is that that press is a low one. As I hold, any facts sufficient to justify that statement would entitle the defendants to succeed in a plea of fair comment. Twenty facts might be given in the particulars and only one justified, yet if that one fact were sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the defendants' plea.

[54] Counsel for the defendants also cited s 9 of the Defamation Act 1957 which reads as follows to make the same argument. The provision reads as follows:

> In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

[55] We find no merit in the submission for the following reasons. The damning accusation against the plaintiffs herein and the SHC was they did not permit the young basketball player from using the Siburan Hall for training purposes and that it indirectly led to her death from the accident. Even if the allegation that the tragic accident indirectly resulted from their refusal to allow the basketball player to use the Siburan Hall can be read as a comment, the basic fact they must prove is that the SHC had barred her from using their facilities. As the trial judge found, this fact was not proved as the mother of the basketball player told the court that her daughter's plan to travel to Beratok village was the original plan and not an alternative plan. She did not say that her daughter was stopped from using the Siburan Hall. This is the most defamatory sting in the nine articles as found by the trial judge. It may well be that other allegations, such as rejection of membership applications without any reason, can be commented upon as lacking in transparency on the part of the executive committee of the SHC. However, there were no proved facts to warrant any comment blaming the death of the basketball player directly or indirectly on the plaintiffs or the SHC. Therefore, we find that the learned trial judge had not erred in rejecting the defence of fair comment.

QUALIFIED PRIVILEGE

[56] When the learned trial judge pronounced her decision on 4 December 2017, she held the defence of qualified privilege failed along with the other defences of justification and fair comment. For this reason, she found the defendants liable and proceeded to make an award of damages. However, in her written grounds of judgment dated 30 January 2020, she said that she erred in holding that the defence of qualified privilege was not proved and she gave her reasons for saying so. However, she was mindful that she cannot revisit her decision. Although the trial judge cannot revisit her decision, in the exercise of our appellate powers, we are not precluded from examining her decision by having regard to the evidence and the law on this point.

[57] Qualified privilege is a defence afforded to defendants that is focused not so much on the contents of a defamatory publication but more on the occasion that the communication is made. We set out below the famous formulation of the qualified privilege test that was given in *Adam v Ward* [1917] AC 309 by Lord Atkinson in the House of Lords:

> It was not disputed in this case on either side that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

[58] The above-mentioned test has been generally followed by our courts. It

was notably adopted in the well-known case *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142b by Hepworth J at the High Court in the following passage.

> A common interest for the purpose of the defence of qualified privilege to an action for libel occurs where the words complained of as defamatory were published in pursuance of an interest or of a duty, legal, social, or moral, to publish them to the person to whom they were published and the person to whom they were published had a corresponding interest or duty to receive them. The reciprocity is essential. The bona fide belief of the defendant that there existed such an interest or that he was under such a duty to make the communication is immaterial, for the thing which is relevant to the question whether or not the occasion was privileged is the existence in fact of the duty or interest and not merely the defendant's belief in the existence of the one or the other.

[59] The defence of qualified privilege would provide wider protection than other defences as the defendant need not prove that the libellous statement was true. The learned trial judge quoted the following passage from *Gatley on Libel and Slander* (11th Ed, para 14.4 [444]–[445]) which provides the reason for this defence. Counsel for the defendants also relied on the same passage to support his argument that however libellous a statement is, it would be protected if published on an occasion of qualified privilege. The passage is as follows:

> Statements published on an occasion of qualified privilege are protected for the common convenience and welfare of society (per Parke B in *Too Goo v Spyring* [1834] 1 CM & R 180 at 193).
>
> It was in the public interest that the rules of law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in the protection of some (self or) common interest (per Bankes L.J. in *Gerhold v Baker* [1918] WN 368 CA at 369).
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> In such cases no matter how harsh, hasty, untrue, or libellous the publication would be but for the circumstances, the law declares it privileged because the amount of public inconvenience from the restriction of freedom of speech of writing would far out-balance that arising from the infliction of a private injury (per Willis J. in *Huntley v Ward* (1859) 6 CB(NS) 514 at 517).

[60] However, the defendant is obliged to satisfy the court that the statement was made pursuant to an interest or of a duty, legal, social, or moral and that the recipient of the statement had a corresponding duty to receive it.

[61] In the instant case, the press conference given by the defendants resulted in the nine articles that were published in the four Chinese newspapers. This was proved at the trial and was not seriously disputed. The defendants did not

dispute that they complained about the rejection of the membership applications by 50 villagers without any reason and that there was no transparency in the manner the applications were processed and rejected. The defendants also did not dispute that the issue of the death of the young basketball player was mentioned. Counsel for the defendants only argued that the correct translation of the articles in question should have been that the refusal of the SHC to open up the Siburan Hall indirectly 'led' to the death and not 'caused' the death of the basketball player.

[62] In respect of the question whether the defendants made the statement in question at the press conference pursuant to an interest or duty to those who had a reciprocal interest or duty to receive it, the learned trial judge addressed it as follows after having second thoughts about the correctness of her decision to reject the qualified privilege defence earlier:

> [167] Moreover, the repeat rejections by SHC would undoubtedly carry with it some adverse reflection on the defendants' respective good character bearing in mind that they were and are well respected public figures and businessmen in the Chinese community. This is especially so when the plaintiffs had asserted that only persons with good character would be accepted into SHC. The rejection by SHC of their applications might imply that the character of the defendants and 47 other applicants is bad and that they are unfit to become members of SHC.
>
> [168] In the premises, the defendants were entitled to be given cogent reasons for their rejection as members. They received no response from SHC from January to July 2010. Under the circumstances of the case, they had legitimate right to require the committee of SHC for an explanation and the committee of SHC was under a moral or social obligation to give their reason for the long delay and the rejection. Given the inertia of the executive committee over the matter, no one could have faulted the defendants' frustration and going to the press as they had done. The defendants honestly believed what they had said and published was true and necessary for the protection of their own legitimate interest and the interest of the public of Siburan village, bearing in mind that the defendants are well respected public figures in the society.
>
> [169] In such circumstances, the publication of the words complained of, in my opinion, fits neatly into the category of privileged occasion that is 'fairly made by a person the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned' — to use the words of Parke B. in *Toogood*.

[63] The learned trial judge also cited *Horrocks v Lowe* [1972] 3 All ER 1098, where Lord Denning said as follows in respect of the honest belief of the defendant although the facts are untrue:

> So long as they honestly believe what they say to be true, they are not to be made liable for defamation. They may be prejudiced and unreasonable. They may not get their facts right. They may give much offence to others. But so long as they are honest, they go clear.

[64] We agree that even if the publication is patently false and defamatory, the honest belief of the defendant would afford a defence. However, having regard to the formulation of the qualified privilege test, the crucial element that must first be proved is the element of reciprocity between the maker of the communication and the receiver. It must have been made on an occasion of privilege. In *Horrocks v Lowe*, the plaintiff and defendant were members of a local authority council and the defamatory statement was made in a council meeting. This is the reason Lord Denning said that:

> It is of the first importance that the members of a local authority should be able to speak their minds freely on a matter of interest in the locality.

[65] In the instant case, by the time of the press conference, the dialogue session between the defendants, the villagers, Penghulu Boon Jim Lim and the local assemblyman was over for quite some time. If the villagers had been invited for a briefing about the rejection of their membership by the defendants, there can be no question about the element of the reciprocity between the parties. The defendants can legitimately claim that they had a duty to discuss the rejection of the membership applications with the villagers. The reason is that it was the defendants who spearheaded a campaign to procure membership for the villagers. Thus, any reasonable criticism on such an occasion against the oligarchic executive committee of the SHC, such as lack of transparency in processing the applications and the wrong assumptions about the death of the young basketball player, will not defeat the defence qualified privilege so long as there is no actual malice and the said beliefs were honestly held.

[66] However, as correctly submitted by counsel for the plaintiffs, the defendants had exceeded the right of qualified privilege as they called a press conference to which at least four Chinese newspapers were invited to air their grievances and criticise the executive committee of the SHC. Therefore, the communication in question was made not only to the villagers in Siburan but to the world at large. In the premises, the element of reciprocity between the maker and receiver of the defamatory communication in terms of duty or interest was absent as the said communication would presumably have reached a broad spectrum of people who are strangers insofar as the dispute over membership of the SHC is concerned. For all the above reasons, the defendants failed in the defence of qualified privilege. Their communication via the press conference was made to parties who did not have a corresponding duty or interest to receive it. Therefore, we find that the decision of the learned trial

judge to reject the defence when Her Ladyship first pronounced her decision on 4 December 2017 was correct. With respect, for reasons given above, we are not persuaded to agree with Her Ladyship's reasoning on this point in the written grounds of judgment that were delivered later.

CONCLUSION ON LIABILITY

[67] Since we found that the learned trial judge did not err in dismissing the defences of justification, fair comment and qualified privilege, the appeal of the defendants on liability should be dismissed. The learned trial judge found that the plaintiffs failed to prove express malice against the defendants herein. However, as the plaintiffs have cross-appealed the finding of the trial judge on malice, for the sake of completeness, we shall also deal with it.

MALICE

[68] It is trite law that actual malice will disentitle a defendant from availing the defence of qualified privilege. The burden to prove actual or express malice is on the plaintiff. The requirement to prove express malice was lucidly explained in the case of *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 by the Supreme Court in the following passage:

> The protection afforded by the law to a publication made on an occasion of qualified privilege is not an absolute protection but depends on the honesty of purpose of the person who makes the publication. If he is malicious, that is, if he uses the occasion for some other purpose than that for which the law gives protection, he will not be able to rely on the privilege. If the publication takes place under circumstances which create a qualified privilege, in order to succeed the plaintiff has to prove express malice on the part of the defendant.

[69] As for the meaning of actual or express malice, in the same case, the Supreme Court defined it as follows:

> Broadly speaking, express malice means malice in the popular sense of or desire to injure the person who is defamed. To destroy the privilege, the desire to injure must be the dominant motive for the defamatory publication. Knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests. The mere proof that the words are false is not evidence of malice, but proof that the defendant knew that the statement was false or that he had no genuine belief in its truth when he made it would usually be conclusive evidence of malice. If the defendant publishes untrue defamatory matter recklessly without considering whether it be true or not, he is treated as if he knew it to be false. In ordinary cases, what is required on the part of the defamer to entitle him to the protection of the privilege is honest belief in the truth of what he published. But if he was moved by hatred or a desire to injure and used the occasion for that purpose, the publication would be maliciously made even though he believed the defamatory statement to be true.

[70] The learned trial judge addressed the issue as follows:

> [176] ... When their applications together with the others were rejected twice by SHC, the rejection carried with it an adverse reflection on their character. It is therefore, natural for them to demand for an explanation of the rejection. When there was no response from SHC, they felt compelled to demand for the same through press statement on 23 July 2010.
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> [177] In respect of the defamatory statements that the death of the young basketball player was indirectly caused by the refusal to open the basketball court, it was said in the honest belief of a duty to speak out for the interest of the people of Siburan village on improving the management of the affairs of SHC and to open up the basketball court for the free use of the people of Siburan. It had not been shown that the dominant motive of the defendants in making that statement was to vent personal spite or the desire to injure or to obtain private advantage or some other purposes rather than the exercise of their duty.
>
> [178] In the circumstances, there was nothing to show that the dominant motive of the publications was to vent personal spite or the desire to injure rather than in the exercise of the duty. The dominant purpose of the publication complained of, was to require the SHC to give a cogent explanation for the long delay and the repeat rejections of the application. Thus, the plaintiffs had failed to discharge the burden of proving malice on the part of defendants.

[71] We have given consideration to the argument of counsel for the plaintiffs that was raised in the written and oral submissions on this issue. We find no merit in them. His basic argument is that the defendants failed to prove the absence of malice because the defamatory imputations in question, especially about circumstances surrounding the death of the basketball player was false. Of course, counsel is right about the general presumption of malice in a defamatory statement. However, in order to defeat the defence of qualified privilege, actual or express malice must be proved and the burden is on the plaintiffs; it is not on the defendants. The learned trial judge saw and heard the witnesses. She found that that they honestly held the opinions in question and that they had no intention to spitefully injure the reputation of the plaintiffs. In the overall circumstances of the case, it is difficult to say that Her Ladyship assessed the facts wrongly. She took into account the fact that the membership applications were rejected twice after a long delay. No reason was given for the rejection. The query of the defendants was not answered by the plaintiffs. They felt it their duty to go to the press to evoke a response. The defendants wanted the villagers to be admitted as members and for this reason, it is completely believable that they would not deliberately seek to attack and besmirch the reputation of the executive committee of the SHC. Insofar as the accusation in respect of the death of the basketball player is concerned, it is quite clear from the nine articles that it was mentioned in order to strengthen their case that membership of Siburan Hall should be opened to all villagers. But in the overall scheme of things in relation to the press conference and their effort to pry open

the doors of Siburan Hall to all villagers, it cannot be said that the tragic death was mentioned at the press conference with the dominant motive to injure the reputation of the plaintiffs or the SHC. They only wanted the villagers to be able to use the facilities available at Siburan Hall. We have also considered the question of whether the defendants were completely reckless in making the statement in question as it can give rise to an inference that actual malice was present. However, as stated by the trial judge, some of the basic facts relating to the death of the basketball player were true. The basketball player did travel to another village to play basketball and died in a road accident on her way back to Siburan. The defendants may have wrongly assumed that she was prevented from playing in Siburan Hall on the day in question. But the question is not whether the defendants got all the facts completely correct. It is whether they were reckless. As we said earlier, the trial judge found as a fact that the defendants were not dishonest even if they were wrong. Therefore, we find that interference with the finding of the trial judge that the plaintiffs failed to prove express or actual malice on the part of the defendants is not warranted.

DAMAGES

[72] Apart from the issue of express malice, the cross-appeal of the plaintiffs is on damages and costs that were awarded by the trial judge. The defendants have also appealed against the award of damages and have described it as a 'windfall', particularly the award in favour of the SHC.

[73] Firstly we shall address the complaint of the plaintiffs that for each of the nine articles, a separate award of damages should have been awarded by the trial judge. We find this proposition to be absurd to say the least. The defendants presided at only one press conference though their statements were reported by four Chinese newspapers in nine articles. The salient point to note is that there was only one press conference insofar as the actions of the defendants are concerned. If counsel for the plaintiffs' argument is followed to its logical extent, assuming 50 or 100 articles were published in respect of the press conference in question, the damages that the defendants would have to pay would have to be multiplied by the number of articles published by news media or others entities who were not made parties in the suit.

[74] The second complaint in the cross-appeal is that the trial judge ordered all the defendants to pay collectively the sum of RM60,000 to Jee Nyen Chong and RM40,000 each to Voon Sam Ted and Chong Vui Kuet. The trial judge also ordered the defendants to pay collectively a sum of RM40,000 to the SHC. Counsel for the plaintiffs argued that each of the defendants should have been ordered to pay damages separately to the three plaintiffs and the SHC.

[75] We find no merit in this complaint as well. As pointed out by counsel for the defendants, after the High Court ordered the consolidation of the three suits filed by the plaintiffs (the defendants herein), the defendants (the plaintiffs herein) filed a joint defence and counterclaim. Furthermore, the tort was committed jointly by the defendants at the press conference. Thus, we find no merit in the argument that each of the defendants should be ordered to pay damages separately. It suffices that the trial judge compensated each of the plaintiffs with a separate award of damages.

[76] The plaintiffs have also appealed against the refusal of the trial judge to award aggravated damages. The learned trial judge exercised her discretion not to award aggravated damages because of the absence of malice on the part of the defendants. The purpose of aggravated damages is to punish the wrongdoer. We see no error in the decision of the trial judge not to award aggravated damages. Aggravated damages are appropriate in defamation if there was 'high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation' (see the Court of Appeal case of *Sistem Televisyen Malaysia Bhd & Ors v Nurullah bt Zawawi & Anor* [2015] 6 MLJ 703; [2015] 9 CLJ 357).

[77] In respect of the appeal of the defendants against the separate award of damages in favour of SHC, our decision is as follows. Each of the plaintiffs (defendants in the original action) was originally sued by the defendants (plaintiffs in the original action) in their personal capacity and as well as office-bearers under s 9(c) of the Societies Act 1966. In the counterclaim (subject matter of this appeal), the plaintiffs herein sued the defendants in the same manner, ie, in their personal capacities as well as office-bearers. As we stated earlier, as each plaintiff is identifiable in the nine articles, they are entitled to a separate award for the damage to their individual reputation. However, since the plaintiffs' individual and office-bearer capacities were conflated, we do not think that a separate award of damages should have been made in favour of the SHC. Furthermore, it has not been demonstrated by evidence that the loss in terms of damage to reputation suffered by the individual plaintiff is different from that suffered by the SHC. Otherwise, as counsel for the defendants submitted, a separate award to SHC would result in a double claim. We shall accordingly quash the award of damages in favour of the SHC. We shall affirm the award of damages of RM60,000 to Jee Nyen Chong and RM40,000 each to Voon Sam Ted and Chong Vui Kuet.

COSTS

[78] Counsel for the plaintiffs has appealed against the order of costs of RM60,000 in favour of his clients. He said that it is inadequate as the trial lasted a month. He suggested that it should be about RM215,000. On the

other hand, counsel for the defendants submitted that the award of costs of RM60,000 was excessive. The learned trial judge addressed the issue of costs as follows:

> This has not been an easy trial given the numerous witnesses and the long articles — nine altogether. The issues were many, submissions long and numerous authorities were cited. Nevertheless, the damages assessed were way below the jurisdiction of the High Court. I considered the global sum of RM60, 000 as costs for the plaintiffs to be appropriate and fair.

[79] We find no merit in the suggestion that the costs awarded by the trial judge was inadequate. The length of the documents, including submissions prepared by the parties, is only one of the factors that must be considered in assessing costs (see O 59 r 16 of the Rules of Court 2012). As noted by the trial judge, the award of damages was well within the jurisdiction of the Sessions Court. In the main trial, costs of only RM40,000 was awarded by the main trial judge. Furthermore, the quantum of costs is within the discretion of the trial judge and is rarely subjected to appellate interference unless it is demonstrably perverse. The trial judge was mindful of the dispute in respect of the quantum of costs and gave fair consideration to the said issue. We do not think it merits interference. In fact, we find the quantum to be fair. In the premises, we shall dismiss the appeal on it by both the plaintiffs and the defendants. However, we shall disturb the order in respect of the calculation of interest. The trial judge ordered interest on the judgment to run from 'date of publications'. Thus, the trial judge granted pre-judgment interest. This issue was addressed only in the oral submission today. In the exercise of our inherent power, we shall vary that part of the judgment and order interest to run only from the date of the High Court judgment which is 4 December 2017.

CONCLUSION

[80] For all the above reasons, the appeal is partially allowed. The award of damages to the SHC is quashed. The award of damages to the plaintiffs is affirmed but the separate award of damages to SHC is set aside. The cross-appeal is dismissed. By consent, parties to pay their own costs.

Appeal allowed in part and cross appeal dismissed.

Reported by K Selvaraju